In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1102

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In 1971, petitioner Union filed a petition with the National Labor Relations Board seeking a representation election among a unit of the employees of Contract Services, Inc., located in the Panama Canal Zone. The Board's Regional Director, after an administrative investigation, dismissed the petition (Pet. 1a-2a), relying on *United Fruit Company*, 159 NLRB 135, review denied, *National Maritime Union* v. *National Labor Relations Board*, 267 F. Supp. 117

(S.D. N.Y.), where the Board had dismissed a similar petition involving a Canal Zone employer. The Board denied review of the Regional Director's decision (Pet. App. 3a). Thereafter, petitioner filed suit in the federal district court seeking an order compelling the Board to conduct a hearing on its petition for a representation election (Pet. App. 4a-9a). The district court directed a hearing (Pet. App. 10a-13a), and the Board, acquiescing in this ruling, reinstated the Union's petition and remanded the case to the Regional Director for a hearing (Pet. App. 17a-19a). Following the hearing, the Board again dismissed the petition (Pet. App. 20a-31a). The Board concluded that, although it had statutory jurisdiction over the Panama Canal Zone (Pet. App. 26a), it would not effectuate the policies of the Act to assert such jurisdiction in the instant case, since that would tend adversely to affect United States-Panamanian relations (Pet. App. 30a-31a).[1]

The Union then returned to the district court, seeking to have it compel the Board to reinstate the election petition, assert jurisdiction, and conduct an election. The district court, in a thorough opinion, upon which we primarily rely, granted the Board's motion to dismiss the complaint, and held that it lacked sub-

[1] The Board noted that negotiations for a new Panama Canal treaty to replace the treaty of 1903 were still under way, and in light of this and other conditions in the Canal Zone, the Board concluded that, "[t]o assert jurisdiction for the first time in this Board's history at this particular juncture would be to risk a negative impact on negotiations" (Pet. App. 29a-30a).

ject matter jurisdiction to review the conclusion of the Board as to this question (Pet. App. 32a-70a). The court of appeals affirmed, for the reasons stated in the district court's opinion (Pet. App. 71a-72a).

2. It is settled that the district courts ordinarily have no jurisdiction to review Board actions in representation proceedings, and that the *Leedom* v. *Kyne*, 358 U.S. 184, exception to this general rule is an extremely "narrow" one. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 480-481; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17; *Teamsters Local 690* v. *National Labor Relations Board*, 375 F. 2d 966, 969 (C.A. 9). *Kyne* held only that the district court has jurisdiction where a suit "is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. In *Kyne*, the Board concededly had violated a specific statutory prohibition [2] by placing professional and non-professional employees in the same bargaining unit without first affording the former a separate vote.

Contrary to petitioner's assertion (Pet. 9, 13-16), the Board has not violated the specific statutory command of Section 9(c)(1) of the Act (Pet. 4) in declining to exercise its jurisdiction here. That section

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[2] Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1), provides that, in determining the unit appropriate for collective-bargaining purposes, "the Board shall not * * * decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

requires the Board to direct an election on a petition only if it finds that "a question of representation affecting commerce exists." Since the Board has power to decline to exercise the full measure of its statutory jurisdiction (see *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 684), Section 9(c)(1) contemplates a determination not only that statutory jurisdiction exists but also that it would effectuate the policies of the Act to exercise it in the particular case. It was thus within the Board's authority to consider whether the policies of the Act would be furthered by holding a representation election here (see discussion at Pet. App. 56a-59a), and, in making that determination, as *Sociedad*, *supra*, makes clear, considerations of international relations are highly relevant.[3]

3. There is no substance to petitioner's contention (Pet. 16-22) that the district court had jurisdiction

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[3] *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C.), and *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064 (C.A. 5), are not to the contrary. In *Miami Pressmen*, the court carefully noted that "9(c)(1) is not mandatory in all instances" (322 F. 2d at 997); that it was dealing with the requirement to certify a valid election; and that "[w]hether a question of representation exists is within that area of expertise in which courts hesitate to interfere" (*id.* at 998, n. 11). And, in *Dixie Color*, the court expressly limited its decision to "the particular circumstances presented here," adding "we do not reach the issue of * * * under what circumstances the Board might justifiably exercise its discretion in refusing to process a representation petition" (444 F. 2d at 1070). See also *National Labor Relations Board* v. *Big Three Industries, Inc.*, 497 F. 2d 43, 53-54 (C.A. 5).

of the suit under Section 10 of the Administrative Procedure Act ("A.P.A."), 5 U.S.C. 701. As the cases cited by the district court (Pet. App. 68a) show, Section 10 does not extend the jurisdiction of the district court to labor cases not otherwise within its competence. The opening clause of the section renders it applicable "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The National Labor Relations Act precludes district court review of the Board action here, and, further, as we have shown, that action was within the allowable area of the Board's discretion under the Act.[4]

Nor is there substance to petitioner's contention (Pet. 22-27) that, since an employer may indirectly obtain judicial review of Board action in a representation proceeding by refusing to bargain and awaiting a Board order (which can be reviewed under Section 10(e) or (f) of the National Labor Relations Act, 29 U.S.C. 160(e) or (f)), it is a denial of equal protection of the laws to preclude the union from ob-

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[4] *Templeton* v. *Dixie Color, supra* (Pet. 20), is inapposite. The court stated (444 F. 2d at 1070, n. 3) that "[w]e do not rely upon the [A.P.A.]" because the district court was found to have jurisdiction under *Leedom* v. *Kyne*. Also inapplicable is *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4) (Pet. 20), which has been limited to cases where agency action is "unreasonably delayed," contrary to Section 6(a) of the A.P.A., 5 U.S.C. 555(b) (see Pet. App. 68a-69a, n. 9). Petitioner makes no such allegation here. *Knight Newspapers, Inc.* v. *United States*, 395 F. 2d 353 (C.A. 6) (Pet. 21), held that the Postmaster General's discretionary act in refusing to grant a postage refund was *not* subject to review under the A.P.A.

taining judicial review in the present case. In a truly parallel situation the treatment of union and employer is the same. Thus, an employer located in the Canal Zone, who filed an election petition with the Board which the Board declined to process because of international relations considerations, would find itself in precisely the same situation with respect to the lack of judicial review as does petitioner here.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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